United States Court of Appeals

for the Second Circuit

JOINT APPENDIX

77-7237
77-7249

ORIGINAL

IN THE

United States Court of Appeals

For the Second Circuit

BRITISH AIRWAYS BOARD and
COMPAGNIE NATIONAL AIR FRANCE,
Plaintiffs-Appellees,

v.

THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY and WILLIAM J. RONAN, W. PAUL STILLMAN, JAMES G. HELLMUTH, VICTOR R. YANITELLI, ANDREW C. AXTELL, GEORGE F. BERLINGER, MILTON A. GILBERT, ROBERT R. DOUGLAS, JAMES C. KELLOGG, III, GUSTAVE L. LEVY, MATTHEW NIMETZ, ALAN SAGNER,
Defendants-Appellants,

and

TOWN OF HEMPSTEAD, INCORPORATED,
VILLAGE OF LAWRENCE, INCORPORATED,
VILLAGE OF CEDARHURST, INCORPORATED,
VILLAGE OF ATLANTIC BEACH, and
ROBERT F. CHECK, MONA GOTTESMAN, and
HERBERT WARSHAVSKY,
Applicants for Intervention-Appellants.

UNITED STATES COURT OF APPEALS
FILED
MAY 27 1977
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

On Appeal from Order of United States District Court for the Southern District of New York, Judge Milton Pollack, Denying Appellants' Motion to Intervene

JOINT APPENDIX

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PAGINATION AS IN ORIGINAL COPY

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2.	Motion of Town of Hempstead, et al. to intervene as parties-defendants served May 19, 1976, and filed July 6, 1976.	4a-22a
3.	Affidavits of Check, Gottesman, and Warshavsky, dated May 4 and 19, 1976, respectively in support of motion.	23a-34a
4.	Memorandum Opinion and Order of Judge Pollack dated July 6, 1976 denying Motion to intervene dated May 19, 1976.	35a-38a
5.	Motion to Intervene dated May 20, 1977 and supporting affidavit.	39a-58a
6.	Motion to vacate judgment under Rule 59 FRCP.	59a-67a
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9.	Minutes of Hearing of May 20, 1977	70a-88a
10.	Minutes of Hearing of May 24, 1977.	89a-100a

DATE	NR.	PROCEEDINGS
[illegible]-76	1	**Filed complaint and issued summons.**
03-17-76	2	**Filed Pltff Compagnie Nationale Air France Affdvt&Order appointing individuals to Serve Summons&Complaint by Roy W.McBride,Thomas J.Benz,Timothy R.Cappel or any of them who is citizen of U.S.&over 18 yrs of age in place&stead of U.S.Marshal.Clk.**
[illegible]-76	3	**Filed Summons with Affdvt of Service by Thomas J.Benz of 15 true copies personally to Francis X.Curley ,atty for defts on 3/17/76.**
04-[illegible]-76	4	**Filed ANSWER of Defts. PJF**
5/7/76		Case Trial before Pollack,J. Affdvt
5-06-[illegible]		Filed Pltffs/British Airways Board/opposes motion of Town of Hempstead to intervene in this action against Port Authority of NY&NJ.
05-04-76	6	Filed Pltff Air France in opposition to motions to intervene.
05-06-76	7	Filed Town of Hempstead,Incorp. Village of Lawrence, Incorp. Village of Cedarhurst Incorp. Village of Atlantic Beach, Robert T. Chee', Mona Cottesman and Herbert Marshall's motion to intervene as defts,etc.
07-06-76		Filed memo-end. on paper # 7 ...Several municipalities, organizations,and private individuals have moved to intervene in this action pur 24(a)(b). For the reasons which appear hereafter, the motions are denied. Leave to renew the motions will be granted, however, on good cause shown...Pollack,J. mn
07-06-76	8	Filed Friends of the Earth, et al.'s notice of motion re: intervention.
07-06-76		Filed memo-end. on paper # 8...Motion denied. See memo of this date on app Town of Hempstead, et al. Pollack,J. mn
07-12-76	9	Filed Pltff's Affdvt&Notice of Motion for summary judgment ret.7/13/76,2:00 P.M.
07-12-76	10	Filed " Memorandum in support of motion for " "
07-12-76	11	Filed Exhibits to Affdvt of John A.Wells for pltff's motion for summary judgment
07-12-76	12	Filed Applicants'Reply to pltffs'opposition to intervention.
07-13-76	13	Filed Memorandum supporting application for intervention .
07-16-76	14	Filed Applicants for Intervention Notice of Appeal from Order denying motion of said " " " to intervene as matter of right,or in alternative to intervene permissively pursuant to provisions of Rule 24(a)(a)&Rule 24(b)(2) FRCP entered 7/6/76.(mailed copies to William C.Clarke,Rogers&Wells&Patrick J.Falvey,Esqs. on 7/16/76)
7-22-76	15	Filed Pltffs'Memorandum in opposition to applicants'motion for a stay.
7-22-76	16	Filed Notice that original record was certified and transmitted to USCA,2nd Circuit.
07-23-76	17	Filed Memorandum in support of applicants'motion for a stay.
07-23-76	18	Filed MEMORANDUM,Motion to stay proceedings is denied.So Ordered.Pollack,J(mn)
		Case [illegible] Trial before Pollack,J. Bench Counsel [illegible] Pltff's Reply to Motion to Intervene
07-26-76	19	**Filed Notice that supp.l record has been certified and transmitted to USCA.**
08-17-76	20	**Filed Affdvt of Ada Swain of affdvt of Service of true copy of Brief Amicus Curiae of State of California in support of Port Authority of NY and NJ;Application for leave to file Brief Amicus Curiae by State of California on behalf of Port Authority of NY&NJ and in opposition to pltffs'motion for Summary Judgment;Order upon Wm.Clarke,Esq.Covington&Burling;Patrick J.Falvey,Esq.Rogers&Wells;William D.Denson,Esq.&Nickerson Kramer,Lowenstein,Nesson,Camin&Soll,Esqs on 8/14/76. Brief Amicus Curiae of State of California in support of Port Authority of NY&N Application for leave to file Brief Amicus Curiae by State of Calif on behalf of Port Authority of NY&NJ&in opposition to pltffs'motion for summary judgment. Order.(Mailed bak one endorsed copy to office in enclosed self-addressed stamped envelope,to Nicholas C.Yost,Deputy Atty General in Charge,Environmental Unit.**
08-17-76	21	**Filed Defts'Memorandum in opposition to pltffs'motion for summary judgment.**
08-17-76	22	**Filed Appendix to Deft's Memorandum in opposition to pltffs'motion for summary judgment.**
08-31-76	23	**Filed Reply Memorandum for pltffs .**
9/3/76		Case trial before Pollack,J.
11-17-76	24	Filed true copy of USCA that order is affirmed with costs to be taxed against appellant.JUDGMENT ENTERED.Clk (mn) Ent.11/19/76

(cont'd on 3)

ISH AIRWAYS BOARD ET ANO	DEFENDANT THE PORT AUTHORITY OF NY&NJ ET AL	DOCKET NO. 76 Civ. PAGE 3 OF ___ PAG

	NR.	PROCEEDINGS
[illegible]-20-76	25	Fld Pltffs Compagnie Nationale Air France affdvt&Notice of motion re: renew its motion in Rm.1306 for summary judgment ret.1/17/77,10:00 A.M.
[illegible]-0-76	26	Fld Pltffs'Memorandum in support of motion for summary judgment.
[illegible]-28-76	27	Filed motion of theGovts. of the United Kingdom and France to file joint statement.
0[illegible]-01-77	28	Filed Reply Memorandum of Pltffs British Airways and Air France.
2-16-77		Pre trial before Pollack J
3/30/77		Pre trial before Pollack J.
4-11-77		Pre trial before Pollack J.
04-27-77	28a	Filed Memorandum of Amici Curiae,Friends of Earth.
04-27-77	29	Filed Brief of Amici Curiae ,Town of Hempstead.
04-27-77	30	Filed Defts'suppl.Memo in opposition to pltffs'motion for summary judgment.
04-27-77	31	Filed Pltff's letter of 4/22/77 with statement of Port Authority's resolution of 4/14/77.
04-27-77	32	Filed pltff's letter of 4/26/77 with statement of law suits.
04-28-77		Hearing begun before Pollack, J. concluded on motion for summary judgment.Decision reserved.
04-28-77	33	Filed Stip&Order that names indicated are substituted as defts in action in place of their predecessors in office.Pollack,J.
05-09-77	34	Filed Post-Argument Memo of Port Authority defts.
05-09-77	35	Filed Appendix to post-argument Memo of Port Authority Defts.
05-10-77	36	Filed Suppl.Memo of Amici Curiae in opposition to pltffs'motion for summary judgment.
05-10-77	37	Filed Amici Curiae,Town of Hempstead,et al Continuation of Argument.of
05-10-77	38	Filed Pltff Compagnie Nationale Air France Documents.
05-11-77	39	Filed OPINION# 45899. SUBMIT JUDGMENT IN ACCORDANCE WITH DECISION WITHIN 10 days hereof,after counsel have conferred on form of proposed judgment. POLLAck ,J.
05-12-77	40	Filed Book-titled"DEPARTMENT OF TRANSPORTATION, UNITED STATES OF AMERICA-AVIATION NOISE ABATEMENT POLICY-OFFICE OF THE SECRETARY-FEDERAL AVIATION ADMINISTRATION.
05-12-77	41	Filed Letter dated 5/6/77 HAND DELIVERY to Hon.Milton Pollack ,with attachment of enclosed opinion of Calif.District Court of Appeal ,4th District in San Diego,136 Cal.Reptr 557(Feb.18,1977) etc.signed Rogers&Wells ,By.John A.Wells and William C.Clarke,Esq.Attys for pltffs.cc:Patrick J.Falvey,Esq. (By Hand)
05-12-77	42	Filed OPINION # 45899. ERRATA.Appearances contd(see front of docket sheet)
5-18-77	43	Filed transcript of record of proceedings, dated 4-28-77
05-20-77		BEFORE POLLACK,J. -Hearing held and concluded.
05-20-77	44	Filed JUDGMENT -Ordered that pltff.s' motion for summary judgment is granted ...defts. are enjoined from interfering with or impeding the operation by pltffs. of Concorde aircraft,etc. and that the effectiveness of this order, judgment and decree is stayed until 4PM 5-24-77 on condition that defts. shall promptly file notice of appeal from this order and judgment and proceed with expedition thereunder. Pollack,J. m/n JUDGMENT ENTERED 5-20-77 Clerk
05-20-77	45	Filed Pltff's Memo in opposition to motion for stay pending appeal.
05-20-77	46	Filed Unsigned Pltff's Counter Proposed Judgment.
05-20-77	47	Filed Affdvt of Alfred de Cabrol of pltff Compagnie Nationale Air France in opposition to defts'application for a stay.
05-20-77	48	Filed Port Authority Defts. Memo in support of motion to stay enforcement of judgment.

(contd pg.4)

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DC-111A REV. (1/75)

CIVIL [illegible] T CONTINUATION SHEET

	DEFENDANT	
BR[illegible]H AIRWAY BOARD ET ANO	PORT AUTHORITY OF NY&NJ ET AL	DOCKET NO. 76-1276 PAGE 4 OF 4 PAGES

DATE	NR.	PROCEEDINGS
05-20-77	49	Filed Defts.Port Authority Notice of Appeal from judgment declaring invalid the Port Authority's temporary ban on Concorde operations at John F.Kennedy International Airport and enjoining enforcement of such ban,entered in this action on May 20,1977.(mailed notice to Wm.C.Clarke,Esq.245 Park Ave.NY,NY10017; Rogers&Wells,Esqs.,200 Park Avenue,NY,NY10017)
05-20-77	50	Filed Applicants for intervention ,Town of Hempstead et al motion to intervene affdvts and motion under Rule 59 FRCP.
05-20-77	-	Filed Memo end.on document #50. Motion denied.So Ordered.Pollack,J. m/n
05-23-77	51	Filed Applicants Memorandum for intervention in support of motions(a)to intervene Rule 24(a)and (b)Rule 59 FRCP.
05-23-77	52	Filed Applicants for intervention -Town of Hempstead,Incorporated Villages of Lawrence,Cedarhurst and Atlantic Beach,Robert F.Check,Mona Gottesman&Herbert Warszawsky Joint Notice of Appeal 2nd Circuit from Order of Judge Pollack denying motion of said applicants for intervention to intervene as matter or right pursuant to prov.of Rule 24(a)(2)FRCP entered on 5/20/77. (mailed notice to William C. Clarke,Roger Wells&Patrick J.Falvey on 5/23/77
05-23-77	53	Filed Notice original Rcd certif & transm. to U.S.C.A. 2nd Circuit
05-24-77	54	" " " " " " " " 1st suppl Rcd

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DC-111A REV. (1/75)

Motion of Town of Hempstead, et al. to intervene as parties-defendants served May 19, 1976, and filed July 6, 1976.

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK

BRITISH AIRWAYS BOARD AND CAMPAGNIE NATIONALE AIR FRANCE, Plaintiffs, v. THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY AND WILLIAM J. RONAN, W. PAUL STILLMAN, JAMES G. HELLMUTH, VICTOR R. YANITELLI, ANDREW C. AXTELL, GEORGE F. BERLINGER, MILTON A. GILBERT, ROBERT R. DOUGLAS, JAMES C. KELLOGG, III GUSTAVE L. LEVY, MATTHEW NIMETZ, ALAN SAGNER, Defendants. TOWN OF HEMPSTEAD, INCORPORATED VILLAGE OF LAWRENCE, INCORPORATED VILLAGE OF CEDARHURST, INCORPORATED VILLAGE OF ATLANTIC BEACH, ROBERT F. CHECK, MONA GOTTESMAN AND HERBERT WARSHAVSKY, Applicants for Intervention.	76 Civ. 1276 (Judge Milton Pollack) Rule 24(a)(2) and (b)(2) FRCP

MOTION TO INTERVENE AS DEFENDANTS

The Town of Hempstead, Incorporated Village of Lawrence, Incorporated Village of Cedarhurst, Incorporated Village of Atlantic Beach, Robert F. Check, Mona Gottesman and Herbert Warshavsky, separately and severally, move for leave to inter-

vene as parties defendant in this action pursuant to the provisions of Rule 24(a)(2) or in the alternative, pursuant to the provisions of Rule 24(b)(2) of the Federal Rules of Civil Procedure, in order to assert the defenses set forth in their proposed answer, a copy of which is attached hereto, and for grounds of said motion, separately and severally assign the following:

The Applicants For Intervention

1. The Town of Hempstead (hereinafter referred to as Town) is a municipal corporation situated in Nassau county, State of New York with executive offices at Town Hall, Hempstead, New York. Said Town's western boundry is coextensive with the south-western boundry of Nassau County and contiguous with the boundry of Queens county, New York. Said Town lies east of John F. Kennedy International Airport (hereinafter referred to as JFK) and comprises 128 square miles in area and has a population of approximately 850,000 inhabitants.

a. The western boundry of said Town extends farther north and farther south than the eastern boundry of JFK, and the easterly end of runway 31L at JFK is located approximately 1300 feet from said Western boundry of said Town.

b. The population density in the area of said Town nearest JFK is approximately 10,000 persons per square

mile, and there are approximately 138,000 persons living in the incorporated villages and in the unincorporated area of said Town within a four mile radius of JFK.

c. There are several thousand residents of said Town living in the flight path of aircraft using runway 31L at JFK. (Affidavits of Robert F. Check, Mona Gottesman and Herbert Warshavsky, attached hereto and made a part of this Motion).

d. Said Town maintains and owns various parks and recreational facilities for use by residents and non-residents and from which use said Town derives substantial revenue, and levies and collects advalorem property and other business taxes on properties within its borders, which revenue is essential and used by said Town in administering said Town government (Affidavit of Warshavsky).

e. The proximity of some of said recreational facilities and properties located within the boundaries of said Town is such that noise originating from aircraft using JFK is readily transmitted to said facilities and properties and is ascertainable by persons using said facilities and properties. (Affidavits of Herbert Warshavsky and Robert F. Check).

2. The Incorporated Village of Lawrence is a municipal corporation, a body corporate and politic, located in the south west corner of the Town of Hempstead, County of Nassau, State of New York with Village Offices at 196 Central Avenue, Lawrence, New York 11559.

a. Said Village of Lawrence has approximately 6900 residents living in homes located within its territorial boundries encompassing approximately 4.5 square miles, and the Northwestern boundry of said Village is approximately 8000 feet from the end of runway 31L at JFK and within the flight path of aircraft using said runway. (Check and Warshavsky Affidavits).

b. Said Village is the owner and operator of recreational facilities consisting of an eighteen hole golf course, which is utilized by persons who are charged fees for using such course, a marina of 110 slips occupied by lessee - boat owners, who pay substantial fees to said Village for the rental of said slips, and seven tennis courts used by persons that are charged fees received by said Village for the use of said tennis courts (Warshavsky Affidavit).

c. The income received by said Village for the use of said facilities is substantial being in excess of $500,000 per year (Warshavsky Affidavit).

d. The Incorporated Village of Lawrence levies and collects an advalorem property tax on the residences and other real property located within its boundaries, which tax revenues are substantial in amount and are used in and essential to the administration of said Village government (Warshavsky Affidavit).

e. The proximity of said recreational facilities and properties located within the boundaries of said Village is such that noise originating from aircraft using JFK is readily transmitted to said facilities and properties and is ascertainable by persons using said facilities and properties (Check and Warshavsky Affidavits).

3. The Incorporated Village of Cedarhurst is a municipal corporation, a body corporate and politic, located contiguous to the Incorporated Village of Lawrence and slightly north thereof in the Town of Hempstead, County of Nassau, State of New York with Village offices located at 200 Cedarhurst Avenue, Cedarhurst, New York.

a. Said Village of Cedarhurst has approximately 7100 residents residing in residences located within its territorial boundaries encompassing approximately one square mile and a boundry of said Village of Cedarhurst is located within 4000 feet of runways at JFK and within the flight path of aircraft using said runways. (Gottesman Affidavit).

b. Said Village of Cedarhurst levies and collects an advalorem property tax on the residences and business properties located within its boundaries, which tax revenues are substantial in amount and are essential to the administration of said Village government.

c. The proximity of said properties located within the boundaries of said Village is such that noise generated by aircraft using JFK is readily transmitted to said properties and is readily ascertainable by persons using said properties. (Check, Gottesman and Warshavsky Affidavits).

4. The Incorporated Village of Atlantic Beach is a municipal corporation, a body corporate and politic, located on the southern boundry of the Town of Hempstead and within it, County of Nassau, State of New York with Village offices located at 65, The Plaza, Atlantic Beach, New York.

a. Said Village of Atlantic Beach has approximately 1675 residents living in homes located within its territorial boundries encompassing approximately one square mile, and has its northwestern boundry within approximately 14,000 feet of runway 31L at JFK and within the flight path of aircraft using said runway.

b. Said Village of Atlantic Beach levies and collects an advalorem property tax on the residences and business properties located within its boundaries, which tax revenues are substantial in amount and are essential to the administration of said Village government (Warshavsky Affidavit).

c. The proximity of said properties located within the boundaries of said Village is such that noise generated by aircraft using JFK is readily transmitted to said properties and is readily ascertainable by persons using said properties. (Check and Warshavsky Affidavits).

5. Robert F. Check, resides at 57 Cedar Road in Inwood, which is an unincorporated area of the Town of Hempstead and located in the Southwesterly portion of said Town in Nassau County and is contiguoug with the Western border of said Town which is adjacent to the County of Queens in the State of New York. (Check Affidavit).

a. Said Check owns his own residence which is valued at $50,000 and has so owned and lived therein at said address for the last 20 years. (Check Affidavit).

b. Said Check residence is located approximately 5,000 feet from runway 31L at JFK and within the flight path of aircraft using said runway. (Check Affidavit).

c. Said Check has a family consisting of a wife and two children of ages 22 and 18 who attended the public schools in Inwood and Lawrence. (Check Affidavit).

d. The proximity of said Check, his family, and residence to JFK is such that noise generated at JFK by aircraft using said airport is readily transmitted to his residence and is ascertainable by persons occupying said home. (Check Affidavit).

5.1. Herbert Warshavsky, resides at 22 Meadow Lane in the Incorporated Village of Lawrence, New York (Warshavsky Affidavit).

a. Said Warshavsky owns his own home which is valued on the open market at about $65,000, and has so owned and lived therein at said address for the last twenty-six years. (Warshavsky Affidavit).

b. Said residence of Warshavsky is located at approximately 9500 feet from the end of runway 31L at JFK and within the flight path of aircraft using said runwa-. (Warshavsky Affidavit).

c. Said Warshavsky lives with his wife at said address, and the proximity of said residence to JFK is such that the noise generated at JFK by aircraft using said airport is readily transmitted to his residence and is readily

ascertainable by persons occupying said home (Warshavsky Affidavit).

5.2 Mona Gottesman resides at 430 Arbuckle Avenue, in the Incorporated Village of Cedarhurst, New York (Gottesman Affidavit).

a. Said Gottesman has resided at said address since September 1973, at which time said Gottesman purchased said home. Its value on the open market is approximately $55,000. (Gottesman Affidavit).

b. Said residence is within the flight path of aircraft using runways at JFK and is approximately 5000 feet from the eastern end of said runways. (Gottesman Affidavit).

c. Said residence is occupied by said Gottesman's family consisting of her husband and two young sons age 11 and 9 years (Gottesman Affidavit).

d. The proximity of said Gottesman, her family, and residence to JFK is such that noise generated at JFK by aircraft using said airport is readily ascertainable by persons occupying said home (Gottesman Affidavit).

The Threatened Injury

6. The Concorde is an aircraft of British-French design and manufactured to travel at supersonic speeds; upon in-

formation and belief the plaintiff's have applied to the defendants for permission to use the facilities, including runway 31L, at JFK for operating said Concorde in commercial flights between JFK and Heathrow Airport in England and said JFK and Charles De Gaulle airport in France.

7. Upon information and belief the noise generated by said Concorde on take off exceeds 136 EPNdB. Under similar conditions of measurement of noise, upon information and belief, the loudest jet (707) aircraft engaged in commercial operations in the United States will generate approximately 107 EPNdB.

8. Upon information and belief, the difference in intensity of noise generated by the Concorde and by the noisest jet, 707, is represented by 29 EPNdB measured logarithmically; for every increase of 10 EPNdB the intensity at 117 EPNdB is 100% greater than at 107 EPNdB, and at the measurement of 127 EPNdB the intensity is 100% greater than at 117EPDNdB; so that at 127 EPNdB the noise is 4 times as severe and intense as at 107 EPNdB. At 137 EPNdB the noise is 8 times as severe and intense as at 107 EPNdB. (Affidavit of Check).

9. Upon information and belief the noise generated and the emission of pollutants by the Concorde are so severe and intense that in utilizing the facilities at JFK and particularly runway 31L, such noise and pollutants will proximately cause residents of applicants, including, but not limited to Robert F. Check, Mona Gottesman and Herbert Warshavsky, and other applicants to suffer injury to their person and damage to their property in that; said noise can and will cause shock and severe stress to the nervous systems of persons residing in said areas and using the recreational facilities of said applicants thereby rendering the same unusuable with the loss of revenue to applicants; and will cause residences belonging to inhabitants of each applicant to become uninhabitable and incapable of a comparable valuable use; land values will be substantially reduced and so will the tax revenues of said applicants; businesses will lose their custom and be forced to leave their present locations with a further loss of revenue to applicants; said noise will further cause the disruption of communication between residents of applicants, normal conversation and communication will become impossible; nervousness and apprehension will replace sleep and repose; the normal use and reasonable enjoyment of homes will be precluded; the health, habits and material comforts will be injuriously affected; the low

frequency energy of some of the components of said noise will cause serious vibrations, equivalent to some earthquakes, to be impacted upon the person and property of those residents of applicants including but not limited to Robert F. Check, Mona Gottesman, and Herbert Warshavsky, said vibrations are capable of and will cause damage to structures internally and externally, as well as additional nervousness and apprehension producing profound and intolerable discomfort to the residents of applicants including but not limited to Robert F. Check, Mona Gottesman and Herbert Warshavsky; and will adversely impact the quality of life and environment of applicants. (Affidavits of Herbert Warshavsky and Robert F. Check).

10. All of the aforesaid injury and damage to applicants is present, immediate and impending and will proximately result from plaintiff's operation of Concorde aircraft at JFK in a surrounding community already heavily impacted by the noise associated with airport operations (Check and Warshavsky Affidavits).

11. The defendant's, in the exercise of their rights as the lessee-operator of JFK, have the authority and power of the proprietor of JFK to set terms and conditions concerning aircraft utilizing the facilities and runways of JFK. Pursuant

to that authority and power of the proprietor of JFK said defendant, on July 12, 1951, established as a term and condition that no jet aircraft may land or take off at JFK without permission of the defendants, and that since 1958, such take offs by jet aircraft be so planned that the noise level of 112 PNdB as measured on the ground in neighboring communities will not be exceeded. Said level applies to all jets using JFK and is for the benefit of the applicants.

12. Pursuant to the exercise of their authority as an airport proprietor-operator said defendant's have declined to permit the plaintiffs to use the facilities and runway at JFK until after at least six months of operating experience of said Concorde at Dulles Internawional Airport and at Heathrow and De Gaulle airports has been evaluated in relating to the Concorde's noise and other environmental characteristics.

Interest Claimed By Applicants

13. Applicants have the right to be free from said present, immediate and impending injury and damage to (a) the existing quality of life and environment of applicants, (b) to the person and property of their residents as well as to (c) the proprietary rights of applicants in their own corporate properties, and including but not limited to the

injuries and damages to the applicants Check, Gottesman and Warshavsky, to their person and property, all of said injuries and damages are presently threatened and will be proximately caused by the illegal use of JFK by the Concorde aircraft illegally operated by the plaintiffs (Affidavits of Check and Warshavsky).

14. As a direct result of the threatened illegal conduct of the plaintiffs in using the facilities of JFK in the illegal operation of Concorde aircraft, thousands of residents of applicants including but not limited to Check, Gottesman and Warshavsky, will be subjected to an unhealthy and unreasonably increased noise and air pollution including the emission of carbon monoxide, nitrogen oxide and hydrocarbons, as well as to an unreasonably increased probability of aviation accident and injury to their person and property. (Check, Gottesman and Warshavsky Affidavits).

15. The interest of applicants in preventing said injuries and damages and adverse environmental impact on and to the residents of applicants, as well as to applicants, including but not limited to Check, Gottesman and Warshavsky, is inextricably involved in and affected by the determinations this Honorable Court will be called upon to make in the pending

case concerning the power and right of the defendants over the use of their runways and facilities at JFK as well as the nature of the defendants' conduct, exercised in behalf of and for the benefit of applicants, as an unreasonable burden upon interstate and foreign commerce.

16. A decision adverse to the defendants that would permit plaintiffs' use of the runways and facilities at JFK for the operation of the Concorde aircraft by plaintiffs will directly cause applicants substantial injury to the person of their residents including but not limited to the applicants Check, Gottesman and Warshavsky, as well as damage to the property of applicants as more specifically set forth above.

The Applicants May Be Impeded In Protecting Their Interest By This Court's Disposition Of The Pending Suit

17. Any disposition of the pending cause by this Court adverse to the defendants will impair and impede the applicants in protecting their rights to be free from said adverse environmental impact and from said injuries and said damages to the person and properties of the residents of said applicants and to said applicants including but not limited to applicants Check, Gottesman and Warshavsky; in addition such disposition

could operate as stare decisis setting a precedent on a new issue, difficult to overcome in any later actions brought by applicants against either one or both of the two plaintiffs, or against the defendants for claims based upon the illegal operation by the plaintiffs of the Concorde aircraft at JFK.

The Interests of the Applicants
May Not Be Adequately Represented
By The Defendants

18. Injuries and damages to the defendants arise primarily from their liability as operators of an airport for their failure to avoid injuring those property owners and residents of applicants, applicants, including but not limited to applicants Check, Gottesman and Warshavsky, residing near JFK. The plaintiffs and defendants are potential party defendants in litigation of claims by applicants arising out of said operation of the Concorde aircraft by the plaintiffs. It is to the advantage of the defendants to minimize the effect of the operation of the Concorde on the applicants.

19. Naturally, the defendants would be content to obtain any type of decision from this Court that will give them immunity from liability or from legal responsibility to residents of applicants, applicants, including but not limited to applicant Check, arising from the operation of the Concorde

aircraft at JFK.

19.1. The defendants have traditionally been opposed to the efforts of applicants to obtain relief from the aircraft noise including two injunctive actions brought in the United States District Court for the Eastern District of New York 272 F. Supp. 226 and 132 F. Supp. 871. In each instance the defendants supported the position of their tenants, the airline operators.

19.2. The applicants are in a better position to make proof of the injuries and damages that will be proximately caused by operation of the Concorde than the defendants. The defendants must be constrained by the fact that it is to the interest of the defendants to show little or no damage proximately caused to applicants by operating the Concorde.

20. The existence of such an adverse interest between the defendants and the applicants is a compelling reason for applicants to seek the aid of this Honorable Court through intervention to protect applicants' interest in the pending litigation between the plaintiffs and the defendants. Such adverse interests of the defendants may result in inadequate representation of the interest of applicants (Affidavits of Check and Warshavsky).

21. The proposed answer of the applicants clearly discloses that there are common questions of fact and law between the issues raised by the present pleadings and said proposed answer.

In addition to the general denial (also the pleading of the defendants), the applicants defenses raise issues of estoppel; the local nature of the problem met by the Terms and Conditions imposed by the defendants as airport proprietors which will negate the existence of an unreasonable burden upon interstate and foreign commerce; the extent of alleged federal preemption; and the balance of considerations in determining an unlawful interference by the Terms and Conditions with the foregin relations of the United States.

22. In addition, in any action to prevent or recover for injuries and damages to applicants proximately resulting from the operation of the Concorde aircraft at JFK by the plaintiffs will be questions of the nature and extent of such injuries, and of the legal liability of the owner or operator of the airport to said applicants. Inherent in this question are such considerations and issues as the extent of the doctrine of preemption, supremacy, and unreasonable burdens upon interstate and foreign commerce, and unreasonable interference with the foreign relations of the federal government.

23. In like manner in comparable actions against the plaintiffs, the operators of the Concorde aircraft, similar questions will arise as in actions against the airport operators.

24. All of these questions are presented in the proposed answer submitted by the applicants for intervention in this proceeding as well as in the answer, in some respects but not all respects, filed by the defendants in this proceeding.

WHEREFORE applicants pray that this motion be granted and that this Honorable Court enter an order:

1. Authorizing the intervention of said applicants as parties defendant, and

2. Permitting the filing of the attached answer to the complaint of the plaintiffs.

3. For such other relief as applicants may be entitled to receive in the premises.

William D. Denson

May 19, 1976

WILLIAM D. DENSON
Attorney for the Applicants
for Intervention
551 Fifth Avenue
New York, New York 10017
Tel. (212) 687-1360

Affidavits of Check, Gottesman, and Warshavsky, dated May 4 and 19, 1976, respectively in support of motion.

AFFIDAVIT OF ROBERT F. CHECK

STATE OF NEW YORK)

COUNTY OF NEW YORK)

ROBERT F. CHECK being first duly sworn deposes and says:

1. My name is Robert F. Check, I live at 57 Cedar Road in Inwood, New York.

2. Inwood is an unincorporated area within the territorial limits of the Town of Hempstead in the County of Nassau, State of New York.

3. I own my home located at the above address and have lived therein for the last twenty years and in the Inwood area for the last forty years which was before John F. Kennedy airport became a jet port. The present cash market value of said home is approximately $50,000 and is situated in a residential community consisting of hundreds of homes of comparable or of less or of greater value.

4. I pay to the Town of Hempstead a tax each year based upon the value of said home, as do other home owners who are residents of the Town of Hempstead.

5. The Inwood area is in close proximity to the John F. Kennedy Airport (hereinafter JFK) and my home is approximately 5000 feet from the eastern end of runway 31L at JFK and within the flight path of aircraft using runway 31L. Within this flight path running easterly, there are, in my judgment, several thousand residents of the Incorporated Village of Lawrence, Cedarhurst, and Atlantic Beach as well as some residences that range in value up to over $100,000 each.

6. I have operated a plumbing business in this area for many years and am thoroughly familiar with the area and the value of properties therein.

7. My family consists of a wife, one son and one daughter, the respective ages of the children being 18 and 22 respectively. My son has suffered with a cardiac ailment that was aggravated by excessive noise. For that reason I became interested in and have actively participated in efforts to mitigate or alleviate the noise associated with airport operations which has heavily impacted the surrounding community at JFK.

8. During the course of the past years I have become familiar with the noise emitted by various aircraft. The noise emitted by some 707s and some 727s is so severe as to

cause me and members of my family serious physical discomfort, prevent us from going to sleep, arouse us from sleep, prevent us from engaging in normal conversation personally or via the telephone, makes us nervous and irritable, interferes with religious services and instruction in the schools, shakes the ceiling and walls of our home down to the very foundations, creates alarm and apprehension for my safety and the safety of members of my family, and has caused shock to my nervous system, as well as such increased stress generally as to produce indigestion and gastro-intestinal malfunctions.

9. It is my information and belief that the Concorde aircraft in using the runways at JFK is capable of and will emit noise whose intensity is not less than five times that of the 707 and 727 aircraft whose effects have been described above.

10. The noise of such intensity will render my home and others located in the Town of Hempstead, Incorporated Villages of Lawrence, Cedarhurst and Atlantic Beach completely uninhabitable as dwellings and prevent the normal use and reasonable enjoyment of same by their owners and occupants. It will adversely affect the use and enjoyment of recreational facilities in said Town and Villages.

11. The noise and pollutants of the Concorde aircraft, in using JFK, will adversely affect the existing quality of life and environment in said communities surrounding JFK to the extent of driving out the home owners and businesses resulting in severe losses in land values to me and other property owners in said localities similarly situated.

12. In all of my efforts to alleviate the impact of the noise and stench upon our community arising from the operation of JFK our complaints were addressed to the Federal Aviation Administration and to the Port Authority of New York and New Jersey. This is the first time in the last decade or more that ostensibly we are working for the same thing. Prior to this time our interests have been opposed because they have represented the interests of the operating airlines which were creating our injury and discomfort. If the Port Authority of New York and New Jersey permits the Concorde to use its facilities at JFK, they will be called to account for such conduct and the injury and damage I will sustain in the proper court.

13. I have read the document entitled "Motion To Intervene As Defendants" and am familiar with its content.

The matters and facts asserted therein are true and correct except as to those asserted upon information and belief, and as to such latter matters they are believed to be true.

Robert F. Check

Subscribed and Sworn to before me on this the 4th day of May, 1976.

Lisa C. Schmidlin

Notary Public

LISA C. SCHMIDLIN
Notary Public, State of New York
No. 31 9321138
Qualified in New York County
Commission Expires March 30, 1978

AFFIDAVIT OF MONA GOTTESMAN

State of New York)
County of New York)

MONA GOTTESMAN being first duly sworn deposes and says:

1. I reside at 430 Arbuckle Avenue, Cedarhurst, New York. I have been a resident of the Incorporated Village of Cedarhurst since I and my husband purchased our home in the Fall of 1973.

2. My home is located within the flight path of aircraft using runways at JFK lying in an east-westerly direction and is apporximately 5000 feet from the end of such runway.

3. At the present time aircraft fly over my home at very low altitudes, as low as 100 to 200 feet. The noise made by such aircraft is very severe, causing the house to shake, interrupting conversation, creating fear and apprehension, shock to me, and at times making the house almost uninhabitable.

4. Any increase in the noise level from aircraft flying overhead or originating at JFK will make living there at my home impossible.

5. At the present time my two young children ages 11 and 9 years respectively are being subjected to interruptions in their schooling because of the present noise level generated by aircraft using JFK.

6. The conditions I have described are those endured by literally hundreds of other residents of the Incorporated Village of Cedarhurst.

7. An increase in the noise level from aircraft using JFK may drive many persons out of this area as the tolerable level of such noise is fast being exceeded in intensity and amount.

Mona Gottesman

Mona Gottesman

Subscribed and sworn to before me on this 19th day of May, 1976.

Lisa C. Schmidlin

Notary Public

LISA C. SCHMIDLIN
Notary Public, State of New York
No. 31-9821138
Qualified in New York County
Commission Expires March 30, 19 78

AFFIDAVIT OF HERBERT WARSHAVSKY

State of New York)
County of New York)

HERBERT WARSHAVSKY being first duly sworn deposes and says:

1. I reside at 22 Meadow Lane, Lawrence, New York, and have occupied said residence, which I own, for the past 26 years. Lawrence is located in the Town of Hempstead, Nassau County.

2. For many years I have been engaged in property management and in the buying and selling of real estate in New York City and in Lawrence. I am familiar with the value of real estate in Lawrence, Cedarhurst and Atlantic Beach, over the past decade.

3. Both Lawrence and Cedarhurst are primarily residential areas and these residences range in value from $25,000 or $30,000 up to $250,000 in value. My house is valued at about $65,000.

4. Lawrence has a population of approximately 6900 residents and is approximately 4.5 square miles in area.

Lawrence has an eighteen hole golf course that is owned and operated by the Incorporated Village of Lawrence, along with seven tennis courts, and a marina consisting of 110 slips for boats.

5. I am and have been since 1972 a Trustee of the Village of Lawrence and know that the revenues from the operation of these three facilities exceeds $500,000. I also know that Lawrence levies and collects an advalorem property tax on real properties within its jurisdiction and that such revenues are essential to the administration of the Village government.

6. My residence on Meadow Lane is within the flight path of aircraft using runways at John F. Kennedy International Airport (JFK). Over the years I have become familiar with the noise emitted by various jet aircraft such as the 707, 727, 747, DC 8, 9 and 10 and others, as they fly over my house, and as they rev up preparatory to taking off.

7. The area included in the corporate limits of Lawrence, Cedarhurst and Atlantic Beach are presently heavily impacted by jet aircraft noise.

8. The noise emitted by these planes using JFK is so intense in these areas as to constitute a serious interference with the enjoyment by the residents of the recreational facilities and of their homes in that sleep is prevented and disturbed, normal communication is interrupted, religious worship is interfered with, and on occasions the noise has been so severe as to cause shock to my nervous system producing irritability and discomfort.

9. As a resident and in my capacity as a Trustee of the Incorporated Village of Lawrence I have from time met with representatives of the Port Authority of New York and New Jersey attempting to alleviate the intensity of the aircraft noise originating at JFK and which plagued the areas of Lawrence, Cedarhurst, Atlantic Beach and Inwood. These efforts were met with promises and promises but no success over the years. Noise abatement procedures suggested and agreed to by the Port Authority and the FAA have not been enforced by either of these agencies. Our area has been and still is the victim of the airline operators who choose to save money rather than conform to those more expensive routing procedures which would mitigate our suffering from the excessive noise.

10. It is my information and I do believe it that the intensity of the noise emitted by the Concorde aircraft is in excess of five times that of the loudest of our subsonic jet aircraft, the B 707. I do know from my experience that noise of that increased intensity will cause our residents, in the areas of Lawrence, Cedarhurst, Atlantic Beach and Inwood to be exposed to much more severe shock, vibration, and personal discomfort and injury than that presently experienced. Such noise from the Concorde will render homes, in the flight path of runway 31L at JFK, and there are hundreds of such homes, to become uninhabitable.

11. There will be an economic and social disruption in the area that will cause depreciation in land values in substantial amounts and certainly in excess of millions of dollars; there will be losses in tax revenues from property and business and in revenues from the recreational facilities in the area that belong to the Town of Hempstead, Lawrence, Cedarhurst and Atlantic Beach.

12. I have read the document entitled "Motion To Intervene As Defendants" and am familiar with its content. The matters and facts asserted therein are true and correct except as to those assertions made upon information and belief,

and as to the latter matters they are believed to be true.

Herbert Warshavsky

Herbert Warshavsky

Subscribed and sworn to before me on this the 19th day of May, 1976.

Lisa C. Schmidlin

Notary Public

LISA C. SCHMIDLIN
Notary Public, State of New York
No. 31-9821138
Qualified in New York County
Commission Expires March 30, 1978

MEMORANDUM

JUL 06 1976

British Airways Board, et al. v. The Port Authority of New York and New Jersey, et al. 76 Civ. 1276 (MP)

(Town of Hempstead, et al)
(Friends of the Earth, et al)

Several municipalities, organizations, and private individuals have moved to intervene in this action pursuant to Fed. R. Civ. P. 24(a), (b). For the reasons which appear hereafter, the motions are denied. Leave to renew the motions will be granted, however, on good cause shown.

Plaintiffs, two foreign airlines, seek declaratory and injunctive relief from the decision by the defendant Port Authority of March 11, 1976, which prohibited them from operating the Concorde supersonic jet aircraft at John F. Kennedy International Airport for six months. The applicants for intervention, who seek to join the suit as defendants, are entities and individuals who have an interest in the noise generated by the airport's operations, as a consequence of their location or residence in areas of Queens and Nassau Counties near the airport, and in environmental protection.[1]

MICROFILM
JUL 06 1976

A. Intervention As of Right

Rule 24(a)(2), Fed. R. Civ. P., establishes a three-pronged test to assess a claim of intervention as of right. An applicant for such intervention must show that (1) he has "an interest relating to the property or transaction which is the subject of the action;" (2) he "is so situated that the disposition of the action

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[1] The applicants for intervention are the Town of Hempstead, the Villages of Lawrence, Cedarhurst, and Atlantic Beach, Robert F. Check, Mona Gottesman, Herbert Warshavsky, Joseph R. Lewis, Carol Berman, the Friends of the Earth, Inc., Metro Suburban Aircraft Noise Association, Inc., Howard Beach Association, Inc., and the Emergency Coalition to Stop the SST.

may as a practical matter impair or impede his ability to protect that interest," and (3) his interest is not "adequately represented by existing parties."

The proposed intervenors have little difficulty meeting the first two of these criteria. As the town governments, residents, community groups and environmental organizations located next to the airport's runways, the applicants have a strong, palpable interest in avoiding the operation of an aircraft whose take-off noise levels may be considerably more intrusive than those of existing aircraft. This interest seems sufficient to constitute an interest relating to the instant lawsuit and to the Port Authority's decision to bar the plane temporarily.

Secondly, the outcome of this suit may well impair the would-be intervenors' ability to protect their interests; should the airlines prevail, not only would the Concorde be permitted to fly, but this Court's decision might immunize the Port Authority from any tort liability in a subsequent action brought by these applicants for intervention. Cf. Farmers Educ. & Coop. Union v. WDAY, Inc., 360 U.S. 525, 535 (1959).

The applicants for intervention stumble on the third prong of the Rule 24(a)(2) test, however, for there is no reason to presume that the Port Authority will not vigorously and conscientiously defend the action which has been brought against it. Whether or not representation of an intervenor's interest by existing parties is to be considered inadequate hinges upon whether there has been a showing of "(1) collusion; (2) adversity of interests; (3) possible nonfeasance; or (4) incompetence." United States v. International Business Machines Corp., 62 F.R.D. 530, 538 (S.D.N.Y. 1974). No such showing has been made here.

While there may be an adversity of interests between the Port Authority and the proposed intervenors in some contexts, it is simply speculation to suppose that any such divergence in viewpoint is applicable on the facts of this case. The instant lawsuit will not resolve the merits of the supersonic aircraft, but simply the

power and authority of a local airport to deny entry to a plane whose flights have been specifically approved by the federal government. The Port Authority would appear to have as great an incentive to safeguard the extent of its power from the instant challenge as would any of the proposed intervenors. The motions to intervene as of right must therefore be denied, although such denial shall be without prejudice to renewal in the event applicants can make a factual showing that the Port Authority is not vigorously litigating any aspect of the case. See New York Public Interest Research Group, Inc. v. Regents, 516 F.2d 350, 352 (2d Cir. 1975).

B. Permissive Intervention

The movants also seek to intervene pursuant to Rule 24(b). Judge Wyzanski has ably stated some of the factors which may affect the exercise of the district judge's discretion on such a motion:

> It is easy enough to see what are the arguments against intervention where, as here, the intervenor merely underlines issues of law already raised by the primary parties. Additional parties always take additional time. Even if they have no witnesses of their own, they are the source of additional questions, objections, briefs, arguments, motions and the like which tend to make the proceding a Donnybrook Fair. Where he presents no new questions, a third party can contribute usually most effectively and always most expeditiously by a brief amicus curiae and not by intervention. Crosby Steam Gage & Valve Co. v. Manning, Maxwell & Moore, Inc., 51 F. Supp. 972, 973 (1943).

This conclusion appears especially apposite to the instant case, for the applicants for intervention might well be tempted to focus their attention on the aspects of the Concorde's operations of greatest concern to them, as opposed to the narrow legal questions placed in issue

by the pleadings in this action.

Accordingly, the motions to intervene are denied in all respects, though without prejudice to renewal upon good cause shown as discussed above. The applicants for intervention may participate in the case by submitting briefs as amici curiae if they wish to do so.

So Ordered.

Milton Pollack
United States District Judge

July 6, 1976

Motion to Intervene dated May 20, 1977 and supporting affidavit.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

BRITISH AIRWAYS BOARD AND CAMPAGNIE NATIONALE AIR FRANCE, Plaintiffs, v. THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY AND WILLIAM J. RONAN, W. PAUL STILLMAN, JAMES G. HELLMUTH, VICTOR R. YANITELLI, MILTON A. GILBERT, HOWARD SCHULMAN, ROBERT F. WAGNER, JAMES C. KELLOGG, III, LEWIS L. GLUCKSMAN, JOSEPH F. CULLMAN, III, ALAN SAGNER, Defendants. TOWN OF HEMPSTEAD, INCORPORATED VILLAGE OF LAWRENCE, INCORPORATED VILLAGE OF CEDARHURST, INCORPORATED VILLAGE OF ATLANTIC BEACH, AND ROBERT F. CHECK, MONA GOTTESMAN, AND HERBERT WARSHAVSKY, Applicants for Intervention.	Civil Action No. 1276 (Judge Milton Pollack)

MOTION TO INTERVENE AS DEFENDANTS PURSUANT TO RULE 24(a)(2) F.R.C.P.

The Town of Hempstead, Incorporated Village of Lawrence, Incorporated Village of Cedarhurst, Incorporated Village of Atlantic Beach, Robert F. Check, Mona Gottesman and Herbert Warshavsky, separately and severally, move for leave to intervene as parties defendant in this action pursuant

to the provisions of Rule 24(a)(2) of the Federal Rules of Civil Procedure, in order to move this Honorable Court under the provisions of Rule 59 of the Federal Rules of Civil Procedure to:

a. Set aside and vacate the judgment entered in the above entitled cause,

b. Deny plaintiffs'motion for a summary judgment,

c. Order an evidentiary hearing to determine whether the conduct of tests described by Secretary Coleman in his opinion dated February 4, 1976, granting an amendment of the operations specifications of the plaintiffs involving the landing and take off of the Concorde aircraft at John F. Kennedy International Airport (JFK), violates rights guaranteed to applicants for intervention by the Due Process Clause of the Fifth Amendment and by the Ninth Amendment to the Constitution of the United States, in that said flights of the Concorde will be a trespass and continuing nuisance which will proximately cause the applicants for intervention to suffer grevious and irreparable harm and personal injury and irreparable damage to their property; that said test flights of the Concorde at JFK are being undertaken with the knowledge that present, immediate and impending personal injury and damage to property

will proximately result to said applicants therefrom; that as a proximate result of said tests employing the Concorde aircraft at JFK, applicants for intervention are being used as human guinea pigs in order to determine the bounds of human tolerance to the noise, vibrations, and pollutants emitted by said Concorde in its operations at JFK, without the consent of said applicants for intervention and contrary to the rights guaranteed to them by the Fifth and Ninth Amendments to the Constitution of the United States; there are available other methods of acquiring the information allegedly sought by the conduct of said tests without inflicting the grevious personal injury and bodily harm and irreparable damage to property of said applicants for intervention;

d. for such other relief as applicants may be entitled in the premises;

and for grounds of this motion to intervene, separately and severally, assign the following:

PRIOR EFFORTS TO INTERVENE

1. On May 19, 1976, these present applicants for intervention served and filed their motion to intervene in

41a

this case along with their proposed answer, affidavits and supporting brief. Said applicants for intervention, in order to avoid useless repetition, do hereby adopt, in support of the instant motion to intervene, said prior motion, affidavits and supporting briefs heretofore served and filed, as fully as though they are set forth verbatim herein. Said former papers are being supplemented as hereinafter set forth in order to present the changed circumstances that affect the rights of the applicants for intervention.

2. This Court considered the prior motion of applicants for intervention, denied the same with leave to renew the motion for good cause shown. This order was affirmed by the U.S. Court of Appeals for the Second Circuit without opinion on November 8, 1976. Such good cause exists at this time.

GOOD CAUSE FOR INTERVENTION EXISTS

3. The Court held in its memorandum of July 6, 1976, that,

> "The proposed intervenors have little difficulty meeting the first two of these criteria (proper interest in the subject of the action, and are so situated that the disposition of the action may impede their ability to protect such interests).***

"The applicants for intervention stumbled on the third prong of the Rule 24(a)(2) test, (their interest is not adequately represented by the party) however, for there is no reason to presume that the Port Authority will not vigorously and conscientiously defend the action which has been brought against it."

4. The Court apparently arrived at this conclusion predicated upon its finding that,

"The instant lawsuit will not resolve the merits of the supersonic aircraft, but simply the power and authority of a local airport to deny entry to a plane whose flights have been specifically approved by the federal government. The Port Authority would appear to have as great an incentive to safequard the extent of its power from the instant challenge as would any of the proposed intervenors".

5. The issues of this law suit, through the decision of this Court, dated May 11, 1977, have now gone far beyond the narrow issue blue-printed by the Court in its decision of July 6, 1976. As the Court indicated, the inquiry in July 1976, related to the "power and authority of a local airport". True enough the Port Authority may have had "as great an incentive" to fend off "the instant challenge" to that authority as the applicants for intervention, hence, the denial of the motion to intervene because of alleged adequate representation by the Port Authority. But times have changed.

6. This Court on plaintiffs' motion for summary judgment held that, the Secretary of Transportation rendered a decision and order dated February 4, 1976, pursuant to the authority granted by 49 USC 1354 (a) (MS 21)*, and that he possessed the authority to "develop, modify, test and evaluate systems, procedures, facilities and devices --- 49 USC ¶1353 (A,b&c) (MS 26); that the Secretary found a "need for actual operating data, the catalyst for the experimental test operations at JFK" of the Concorde aircraft (MS 27).

7. These findings and the Court's decision thereon put a new dimension on the issues decided by the Court. "The need for actual operating data, the catalyst for the experimental test operations at JFK" (MS 27), raises a factual issue of whether these tests of Concorde operations, authorized by the Secretary of Transportation, have such an impact upon the applicants for intervention by the infliction of grevious personal injury, bodily harm and irreparable damage to them and their property as more specifically set forth in paragraphs 9-16 on pages 11-15 of said original motion to intervene, as to deprive said applicants for intervention of their rights, under the Fifth and Ninth Amendments to the U.S. Constitution, to be free from such invasion.

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* (MS-) refers to the manuscript of this Courts decision dated May 11, 1977.

8. The United States Court of Appeals for the Tenth Circuit passed upon tests that were being made upon supersonic military aircraft like the Concorde, at Oklahoma City in the case of Coxsey v. Hallaby 334 F2d 286 (1964). The plaintiffs had filed an action in the State Courts of Oklahoma for an injunction against the Federal Aviation Administrator and Air Corps officers engaged in conducting sonic boom tests, allegedly pursuant to 49 USC 1353(b). Plaintiffs there alleged that such tests were causing serious personal injury and irreparable damage to property and constituted a nuisance. The State Court granted an exparte injunction. The defendants removed the case to the Federal District Court and there moved for a dissolution of the injunction and for a summary judgment, which was granted. The plaintiffs appealed and the U.S. Court of Appeals reversed the judgment and remanded the case to the District Court for an evidentiary hearing to resolve the issues of fact as to whether the tests were being conducted in such fashion as to -"offend the due process requirements. The plaintiffs insist that they have been damaged to such an extent and in such a manner that the Constitution has been violated. In our opinion the case presents a genuine issue over material facts and cannot be decided in summary judgment proceedings" - 334 F2d 287.

9. The applicants for intervention have asserted, both in their original motion to intervene and its supporting papers (orig. motion pp. 11-15, ¶9-16) and in the instant motion, the same allegations of irreparable injury to their person and irreparable damage to their property as were considered by the appellate court in the Coxsey case to require an evidentiary hearing on whether such tests will in fact constitute a deprivation of their Constitutional rights to be free from injury to person and damage to property.

10. The existence of the question of the constitutionality of the tests proposed by Secretary of Transportation Coleman is a complete answer to the May 11, 1977, decision of this Court with respect to the granting of the summary judgment for the plaintiffs. Since there are present in this constitutional question material issues of fact as to the nature and extent of the harm inflicted by the operation of the Concorde at JFK requiring an evidentiary hearing, it was, therefore, improper for this Court to grant a summary judgment.

11. Nor is the impropriety of the Court's action in granting summary judgment cured by the Court's obtaining a concession from counsel for the plaintiffs and counsel for the defendants that the Court is not called upon, on this motion,

to determine the merits or demerits of the noise emitted by the Concorde nor whether the aircraft should be given a chance to prove itself (MS of Hearing pp. 34,92).*

INADEQUATE REPRESENTATION BY PORT AUTHORITY

12. The Court's action in obtaining this concession from counsel for the Port Authority effectively prevents the Port Authority from asserting the defense of the unconstitutionality of the action of Secretary Coleman relating to the tests of the Concorde at JFK.

13. Indeed, the Port Authority has stated that it will not assert the defense of the unconstitutionality of the Concorde tests proposed by Secretary Coleman, predicated upon the constitutionally offensive nature of the tests' impact upon the applicants for intervention.

14. The failure of the Port Authority to assert the true nature of the impact of the operation of the Concorde on applicants for intervention is attributable to their desire to protect themselves from future liability to applicants arising from the operation of the Concorde at JFK. This antagonistic attitude of the Port Authority was asserted in

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*(MS of Hearing-) refers to transcript of oral argument of April 28, 1977.

the original motion papers to intervene as a prediction based upon human nature (Orig. Motion ¶18, 19 and 19.2 - on pages 16-17). It is now a reality, and clearly establishes the adverse nature of the Port Authority's interest to that of applicants for intervention and the total inability of the Port Authority to adequately represent the interests of the applicants for intervention.

15. The decision of this Honorable Court goes beyond the issue predicated upon the conflict between the action of the Secretary of Transportation in allegedly ordering the use of JFK by the Concorde, which the Secretary refused to do, and the action of the Port Authority in denying landing rights to the Concorde. This is the issue presented by the parties to the Court for its determination. This was the issue briefed and argued by the parties. This was the issue which the parties asserted was "ripe for summary judgment". No party considered the provisions of the Code which provided authority to the Secretary of Transportation to conduct tests which tend to the creation of "improved aircraft" - 49 USC 1353 (b) nor the case of Coxsey v. Hallaby 231 F. Supp. 978, until those matters were called to the attention of the parties at the oral argument by the Court (MS Hearing pp. 113-114). There is

no reference to these matters in any of the briefs of counsel for the parties, nor in the sixty-one page decision of February 4, 1976, of the Secretary of Transportation.

16. At the oral argument, in the short time allotted counsel for these applicants for intervention, as amicus, informed the Court that the Court had "done a magnificent job of turning this whole matter upside down. You started out here with the naked issue - the naked issue of whether or not the Port Authority had the power to issue that ban. Now, your Honor has switched this thing back around to this evidentiary hearing, which I wanted to have a long time ago, but ---" (MS Hearing p. 133)

17. The Court stated to Mr. Denson, counsel for the present applicants for intervention, that:

> "They (the Port Authority) are not saying that there is anything vicious or improper about these four minute take offs during all these hours, 16 hours or 15 hours a day. If that is so, then it seems to me that as we have done in all cases coming into the federal court, we are prone to say, give them a chance to prove or disprove what is going on, and if that chance to prove or disprove what is going on is not so bad that it is on its face something that is thoroughly unacceptable, I hesitate to believe that the Town of Hempstead or the Port Authority can contradict the Federal Government in its appreciation of what is good for the national good" (MS Hearing p. 134-135).

To this remark Mr. Denson replied,

> **"The only problem I have with it is this:
>
> "Number One. Will Your Honor use 450,000 people out there as guinea pigs, that is number one.
>
> ****
>
> "You want to give everybody a chance. I will agree with you. Let's have that chance. Let us prove it here before Your Honor whether it is good, bad, or indifferent".
>
> (MS Hearing pp. 135-136)

The Court was well aware of the existence of material issues of fact such as outlined by the Court in the above colloquey, ie., "and if that chance to prove or disprove what is going on is not so bad that it is on its face something that is thoroughly unacceptable"***. The unacceptability of the tests were excluded improperly by the Court by a denial of the original motion to intervene and by obtaining a concession from both counsel for the parties, that the merits or demerits of the Concorde noise was not at issue. The motion for summary judgment should never have been granted.

18. The granting of the plaintiffs' motion for summary judgment on a record tailored to exclude the constitutional defense of the applicants for intervention constitutes prejudicial error requiring the setting aside of the judgment entered on May 20, 1977.

19. The decision and judgment that has been rendered in this case does not only affect the parties to the litigation, but they directly, substantially, and adversely affect the interests of literally a half million residents in the vicinity of JFK. To permit the parties to this litigation to tailor the record so as to produce a record which ignores this palpable and compelling public interest constitutes a miscarriage of justice that can and should be corrected by the action of this Honorable Court in setting aside the order granting said motion for summary judgment and directing an evidentiary hearing on the issue of whether the rights of the applicants for intervention, guaranteed by the provisions of the Fifth and Ninth Amendments to the U.S. Constitution to be free from the infliction of serious personal injury and irreparable damage to property proximately resulting from the operation of the Concorde at JFK, are being denied.

20. The noise generated by the Concorde take offs on other runways similar to those at JFK have been measured at 138 perceived noise decibels. This is eight times as intense as the noise generated by the fleet of subsonic jets. The vibrations produced by the Concorde have been measured to be in excess of five times that produced by subsonic jets presently in use.

21. Applicants for intervention, based upon the measurements made in Heathrow Airport in England, Dulles International Airport, and data supplied by the manufacturers or producers of the Concorde, relating to the noise emitted by the Concorde, reallege the matters and facts set forth in paragraphs 9 and 10 on pages 11 and 12 of this original motion to intervene dated May 19, 1976, except that these allegations are now made on the foregoing facts and no on "information and belief", and applicants for intervention make such allegations a part of this present motion to intervene as fully as though they are set forth verbatim herein.

22. The defenses possessed by the applicants for intervention which the Port Authority either cannot or will not assert in this proceeding are set forth in the Motion under Rule 59 F.R.C.P. which is a part of this motion to intervene as the pleading sought to be asserted at this state of the litigation.

23. The applicants for intervention have now satisfied all three requirements of Rule 24(a)(2) of the Federal Rules of Civil Procedure governing intervention as a matter of right, and this motion should be granted.

24. The affidavits of Robert F. Check, Mona Gottesman and Herbert Warshavsky previously filed in the original motion to intervene are asserted in support of this motion along with the affidavit of Joseph R. Lewis.

WHEREFORE, this motion to intervene as parties defendant to file the attached Motion under Rule 59 should be granted.

William D. Denson

WILLIAM D. DENSON
551 Fifth Avenue
New York, New York 10017
Tel. No. (212)687-1360
Attorney for Applicants for
Intervention

AFFIDAVIT OF JOSEPH R. LEWIS

STATE OF NEW YORK)

COUNTY OF NEW YORK)

JOSEPH R. LEWIS, being first duly sworn deposes and says:

1. My name is Joseph R. Lewis, and I live at 322 Mott Avenue, Inwood, New York.

2. Inwood is an unincorporated area within the territorial limits of the Town of Hempstead, in the County of Nassau, State of New York.

3. I own my home located at the above address and have lived there with my wife for over 25 years.

4. I am employed by the Town of Hempstead, as the Executive Director of the Town-Village Aircraft Safety and Noise Abatement Committee (TVASNAC). As the name implies this Committee is concerned with the relationships between the Town of Hempstead and its residents and the Port Authority of New York and New Jersey which operates the John F. Kennedy International Airport in so far as aircraft safety and noise abatement are concerned.

5. In the course of my duties I have occasion to receive reports from the FAA as well as foreign governmental bodies dealing with aircraft noise. As a further part of my duties I am aware of, consult with and advise counsel representing the Town of Hempstead, Incorporated Villages of Lawrence, Cedarhurst and Atlantic Beach in the litigation between the British Airways and Air France and the Port Authority of New York and New Jersey. I am thoroughly familiar with the proceedings had in this matter up to and including the present time.

6. I have read and understood the motion of counsel for the Town of Hempstead, et al to intervene in this litigation and have further read and understood the motion of said counsel to set aside and vacate the judgment of Judge Pollack rendered in these proceedings. The allegations of fact and matters set forth in each of said two motions are both true and correct.

7. My home is located within the flight path of aircraft using Runway 31 L and within 8,000 feet of the eastern end of said runway at JFK and planes landing or taking off from that runway fly over my house at varying altitudes. On some occasions these planes are no higher than 400 feet above my house, at other times particularly during the summer months these planes are even lower in altitude.

8. During the course of the years I have become familiar with the noise emitted by various aircraft as well as with the vibrations that they create in passing over my house. On some occasions the noise emitted by some 707's and some 727's is so severe as to cause me and my wife serious physical discomfort, prevent us from going to sleep, arouse us from sleep, prevent us from engaging in normal conversation, personally or via the telephone, makes us nervous and irritable, shakes the ceilings and walls of our house down to its very foundations, creates alarm and apprehension for my own safety and that of my wife and has caused some shock to my nervous system as well as increased stress generally so as to produce indigestion and gastrointestinal malfunctions.

9. From the reports that I have received, in the course of my duties as Executive Director of TVASNAC, the intensity of the noise emitted by the Concorde aircraft is measured at approximately eight times that of the noise of the subsonic jets presently flying over my house and that the vibrations created by the Concorde are five times that of the subsonic jets presently flying over my house.

10. Any such increase in the noise and vibrations will render my home uninhabitable and will cause serious shock to my nervous system and materially increase the indigestion and gastrointestinal malfunctions to which I am presently subjected.

11. The noise of the intensity of that emitted by the Concorde will render not only my home but others located in the Town of Hempstead, Incorporated Villages of Lawrence, Cedarhurst and Atlantic Beach completely uninhabitable as dwellings and prevent the normal use and reasonable employment of same by their owners and occupants.

12. The noise and pollutants of the Concorde aircraft in using JFK will adversely affect the existing quality of life and environment in said communities surrounding JFK to the extent of driving out the home owners and businesses resulting in severe losses in land values to me and to other property owners in said localities similarly situated. In this connection the reasonable cash market value of my home is approximately $35,000.

13. I have not consented in any way to be utilized as a guinea pig to test the extent of my tolerance to the noise, vibrations, or pollutants emitted by the Concorde aircraft and I strenuously object to such proposed treatment which I know will cause irreparable harm and injury to me personally and to others similarly situated.

14. To expose my wife and me to the severe consequences inevitably involved in the test operations of the Concorde at JFK constitutes a vicious, improper, and totally unacceptable course of conduct.

15. I was present in the courtroom on April 28, 1977, at the time of the oral argument and heard counsel for the Port Authority admit that there was no material issue of fact before the court and that the court was not being asked to decide whether the noise of the Concorde was tolerable or unacceptable.

Joseph R. Lewis

Subscribed and sworn to before me on this the 20th day of May, 1977.

Lisa C. Schmidlin

Notary Public

LISA C. SCHMIDLIN
Notary Public, State of New York
No. 31 [illegible]
Qualified in New York County
Commission Expires March 30, 1978

Motion to vacate judgment under Rule 59 FRCP.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

BRITISH AIRWAYS BOARD AND CAMPAGNIE NATIONALE AIR FRANCE, Plaintiffs, v. THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY AND WILLIAM J. RONAN, W. PAUL STILLMAN, JAMES G. HELLMUTH, VICTOR R. YANITELLI, MILTON A. GILBERT, HOWARD SCHULMAN, ROBERT F. WAGNER, JAMES C. KELLOGG, III, LEWIS L. GLUCKSMAN, JOSEPH F. CULLMAN, III, ALAN SAGNER, Defendants. TOWN OF HEMPSTEAD, INCORPORATED VILLAGE OF LAWRENCE, INCORPORATED VILLAGE OF CEDARHURST, INCORPORATED VILLAGE OF ATLANTIC BEACH, AND ROBERT F. CHECK, MONA GOTTESMAN, AND HERBERT WARSHAVSKY, Applicants for Intervention.	Civil Action No. 1276 (Judge Milton Pollack)

MOTION TO VACATE JUDGMENT
AND OTHER RELIEF PURSUANT
TO RULE 59 F.R.C.P.

Now come the Town of Hempstead, Incorporated Village of Lawrence, Incorporated Village of Cedarhurst, Incorporated Village of Atlantic Beach, Robert F. Check, Mona Gottesman and Herbert Warshavsky, separately and severally, and move

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the Court to:

a. Set aside and vacate the judgment entered in the above entitled cause,

b. Deny plaintiffs motion for a summary judgment,

c. Order an evidentiary hearing to determine whether the conduct of tests described by Secretary Coleman in his opinion dated February 4, 1976, granting an amendment of the operations specifications of the plaintiffs involving the landing and take off of the Concorde aircraft at John F. Kennedy International Airport (JFK), violates rights guaranteed to applicants for intervention by the Due Process Clause of the Fifth Amendment and by the Ninth Amendment to the Constitution of the United States, in that said flights of the Concorde will be a trespass and continuing nuisance which will proximately cause the applicants for intervention to suffer grevious and irreparable harm and personal injury and irreparable damage to their property; that said test flights of the Concorde at JFK are being undertaken with the knowledge that present, immediate, and impending personal injury and damage to property will proximately result to said applicants therefrom; that as a proximate result of said tests employing the Concorde aircraft at JFK, applicants

for intervention are being used as human guinea pigs in order to determine the bounds of human tolerance to the noise, vibrations, and pollutants emitted by said Concorde in its operations at JFK without the consent of said applicants for intervention and contrary to the rights guaranteed to them by the Fifth and Ninth Amendments to the Constitution of the United States; there are available other methods of acquiring the information allegedly sought by the conduct of said tests without inflicting the grevious personal injury and bodily damage to property of said applicants for intervention;

d. For such other relief as applicants may be enti led in the premises;

and for grounds of this motion, separately and severally assign the following:

1. The capacity of each of the applicants for intervention is alleged in their original motion to intervene, dated May 19, 1977. For the convenience of the Court and to avoid useless repetition, the allegations of paragraphs 1-5.2 with their respective sub-paragraphs on pages 2-9 of said original motion are hereby adopted and made a part of this motion as fully as though they are set forth verbatim herein.

2. The interest of each of the applicants for intervention is alleged in their original motion to intervene, dated May 19, 1977. For the convenience of the Court and to avoid useless repetition, the allegations of paragraphs 6-16 on pages 9-15 of said original motion are hereby adopted and made a part of this motion as fully as though they are set forth verbatim herein, except the allegation, "upon information and belief", is hereby stricken from each of the paragraphs 6, 7, 8 and 9 whereever the same occurs therein.

3. The plaintiffs' motion for summary judgment was granted by the Court upon tailor made record which wrongfully and illegally sought to exclude material issues of fact which are inherent in the disposition of said motion by the Court.

4. The Court has held that Secretary Coleman directed the institution of test flights of the Concorde aircraft at JFK pursuant to the authority of 49 U.S.C. 1353(b).

5. The Court assumed that such test operations of the Concorde aircraft are not "vicious or improper", or are "not so bad that it is on its face something that is thoroughly unacceptable" (MS Hearing 134-135).

6. Such assumption by the Court flys in the face of the facts alleged by the applicants for intervention to the effect that the operations of the Concorde at JFK would proximately

cause grevious bodily harm, personal injury and irreparable injury and damage to applicants for intervention more particularly described in paragraphs 9-16 on pages 11-14 of said original motion to intervene and realleged herein.

7. There is a clear issue of material fact as to whether the proposed test operations of the Concorde at JFK are so "vicious", "improper" and "unacceptable" as to be constitutionally offensive to the rights of the applicants for intervention guaranteed to them by the Due Process Clause of the Fifth Amendment by the Ninth Amendment to the Constitution of the United States.

8. It is not enough to assert that the airlines and the Port Authority have not raised the issue of the viciousness, impropriety, or unacceptability of the test operations of the Concorde aircraft at JFK, hence this is not an issue on the record before the Court. Such a position serves only to point up the grossly prejudicial error committed by this Court on July 6, 1976, when the motion of applicants to intervene was denied by this Court.

9. It was disclosed to the Court in July 1976, that it was unlikely and unnatural that the parties would raise this issue because it was to their financial advantage to ignore

such an issue.

10. The Concorde aircraft emits noise, vibrations and pollutants when operated in making landings and takeoffs. The intensity of the noise emitted by the Concorde has been measured to be 138 perceived noise decibels on take off. This intensity of noise emitted by the Concorde aircraft may be comparable to 110 perceived noise decibels of the loudest subsonic jet. These measurements of intensity are on a logarithmic scale so that the difference of 28 perceived noise decibels establishes the intensity of the Concorde's noise to be almost 8 times as great as that of the loudest subsonic jet using JFK. The vibrations produced by low frequency components of the noise due to the operation of the Concorde are not less than five times as intense as that of the noisest subsonic jet using JFK, and are the equivalent of some earthquakes. The pollutants emitted by the Concorde consisting of sulphur dioxide, nitrogen oxides, carbon monoxide, hydro-carbons, burned and unburned, and other noxious materials pose a severe threat to the environment of if not of personal injury to the applicants for intervention.

11. The consequences of the operation of the Concorde aircraft at JFK as described by Secretary Coleman in the amended operations specifications of the plaintiffs are vicious,

improper and totally unacceptable in that they inflict the injuries and damages previously described upon applicants for intervention and directly adversely affect the lives and property of a half of a million residents in and around JFK.

12. Applicants for intervention, without their consent, are being used as guinea pigs to ascertain the bounds of human tolerance to the noise, vibrations and pollutants emitted by the operation of the Concorde aircraft at JFK. Said test operations are being conducted with the knowledge that injury and damage will likely and probably result to applicants for intervention and with reckless disregard of the consequences. Such conduct of said tests is a clear deprivation of the rights of applicants for intervention to be free from being used as human guinea pigs in violation of the protection granted by the Due Process Clause of the Fifth Amendment and by the Ninth Amendment to the Constitution of the United States.

13. The action of the Court in depriving applicants for intervention of the opportunity to assert the defense of the unconstitutionality of the test operations of the Concorde at JFK and to be heard thereon, constitutes a violation of the Due Process Clause of the Fifth Amendment and of the Ninth Amendment to the U.S. Constitution.

14. The Court erroneously and improperly decided that the test operations of the Concorde at JFK should go forward, which involved issues affected with a broad and intense public interest, without affording an opportunity to applicants for intervention to make a record asserting the unconstitutionality of said test operations.

15. An evidentiary hearing on the impact of the test operations of the Concorde aircraft upon applicants for intervention will disclose that it is vicious, inhuman, improper, and thoroughly unacceptable, capable of inflicting irreparable h rm and injury to person and to property if permitted to be implemented.

16. The Port Authority has declined to assert this defense. The sustaining of such a defense is dispositive not only of the plaintiffs' motion for summary judgment but of the merits of their entire complaint.

17. It is grossly improper to preclude the applicants for intervention from asserting constitutional defenses that are dispositive of this entire litigation.

18. This motion is supported by the prior affidavits of Robert F. Check, Mona Gottesman and Herbert Warshavsky and by the further affidavit of Joseph R. Lewis.

WHEREFORE, this motion to: set aside or vacate the judgment granting plaintiffs' motion for summary judgment, denying said motion for summary judgment, and order an evidentiary hearing on the constitutionally offensive character of the test operations of the Concorde at JFK, should in all respects be granted.

William D. Denson

WILLIAM D. DENSON
551 Fifth Avenue
New York, New York 10017
Tel. (212) 687-1360
Attorney for Applicants for
Intervention

Memorandum order endorsed on Motion to Intervene
denying same dated May 20, 1977.

Memorandum Order endorsed on Motion to Intervene
denying same dated May 20, 1977

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

BRITISH AIRWAYS BOARD AND CAMPAGNIE NATIONALE AIR FRANCE, Plaintiffs, v. THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY AND WILLIAM J. RONAN, W. PAUL STILLMAN, JAMES G. HELLMUTH, VICTOR R. YANITELLI, MILTON A. GILBERT, HOWARD SCHULMAN, ROBERT F. WAGNER, JAMES C. KELLOGG, III, LEWIS L. GLUCKSMAN, JOSEPH F. CULLMAN, III, ALAN SAGNER, Defendants. TOWN OF HEMPSTEAD, INCORPORATED VILLAGE OF LAWRENCE, INCORPORATED VILLAGE OF CEDARHURST, INCORPORATED VILLAGE OF ATLANTIC BEACH, AND ROBERT F. CHECK, MONA GOTTESMAN, AND HERBERT WARSHAVSKY, Applicants for Intervention.	Civil Action No. 1276 (Judge Milton Pollack)

JOINT NOTICE OF APPEAL

Notice is hereby given that the Town of Hempstead, Incorporated Villages of Lawrence, Cedarhurst and Atlantic Beach, Robert F. Check, Mona Gottesman, and Herbert Warshavsky, applicants for intervention in the above entitled cause hereby appeal to the United States Court of Appeals for the Second

Circuit from the Order of Judge Milton Pollack denying the Motion of said applicants for intervention to intervene as a matter or right in the above entitled action, pursuant to the provisions of Rule 24(a)(2) of the Federal Rules of Civil Procedure, entered in this action on the 20th day of May,1977.

Dated: May 23, 1977

William D Denson

WILLIAM D. DENSON
551 Fifth Avenue
New York, New York 10017
(212)687-1360
Attorney for the above named
Applicants for Intervention

rkas

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

- -x

BRITISH AIRWAYS BOARD and COMPAGNIE NATIONALE AIR FRANCE,

Plaintiffs,

- against - 76 Civ. 1276

THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY; WILLIAM J. RONAN; W. PAUL STILLMAN; JAMES G. HELIMUTH; VICTOR R. YANITELLI; ANDREW C. AXTELL; GEORGE F. BERLINGER; MILTON A. GILBERT; ROBERT R. DOUGLASS, JAMES C. KELLOGG, III; GUSTAVE L. LEVY; MATTHEW NIMETZ; ALAN SAGNER, Commissioners of the Port Authority of New York and New Jersey,

Defendants.

- -x

New York, New York
May 20, 1977 - 2:00 p.m.

B e f o r e:

HONORABLE MILTON POLLACK,

District Judge.

A p p e a r a n c e s:

WILLIAM C. CLARKE, Esq.
Attorney for Plaintiff British Airways Board
245 Park Avenue
New York, New York 10017
BY: PETER JOHN NICKLES, Esq., and
JOHN MICHAEL CLEAR, Esq., of Counsel.

 (Cont'd.)

Appearances: (Cont'd.)

ROGER & WELLS
Attorneys for Plaintiff Compagnie Nationale Air France
200 Park Avenue
New York, New York 10017
BY: STANLEY GODOFSKY, Esq.,
STEPHEN FROLING, Esq., and
TIMOTHY CAPPEL, Esq., of Counsel.

PATRICK J. FALVEY, Esq., and
JOSEPH LESER, Esq.
Attorneys for Defendants
One World Trade Center
New York, New York 10048

NICKERSON, KRAMER, LOWENSTEIN, NESSEN, KAMIN & KOLL
Amici Curiae
919 Third Avenue
New York, New York
BY: CHARLOTTE M. FISCHMAN, Esq., of Counsel.

WILLIAM D. DENSON, Esq.
Amicus Curiae
551 Fifth Avenue
New York, New York 10017.

- - -

THE COURT: The Court has received a proposed form for the judgment in respect to the decision heretofore made, both from the moving parties, the plaintiffs, and from the opposing parties, the defendants.

As I read these papers, apparently both sides are agreed on the language which would carry into effect the Court's order except as to the last paragraph in each submission. In other words, there is no semantic controversy concerning the remainder of the proposed judgment.

On behalf of the plaintiffs, is that correct?

MR. GODOFSKY: Yes.

THE COURT: On behalf of the defendants, is that correct?

MR. NICKLES: Yes.

MR. FALVEY: Yes, your Honor.

THE COURT: Accordingly, the Court will accept the language submitted by the parties insofar as it has thus been agreed upon and will hear the parties separately in connection with their respective additions.

Who will speak for the plaintiff?

MR. GODOFSKY: I will, your Honor, on the first paragraph.

If it please the Court, my name is Stanley

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Godofsky and I appear this afternoon on behalf of Air France.

Before I turn to the proposed form of judgment, I would like to convey to the Court Mr. Wells' regrets that he can't be with us this afternoon, but he is recouperating from an operation.

Turning now to the proposed decree, the paragraph which plaintiffs have submitted and which the Port Authority objects to, is a decretal provision which requires the Port Authority to take all steps and perform all acts necessary to facilitate the operation of the Concorde aircraft to, from, and at JFK International Airport in accordance with the order of Secretary Coleman and plaintiffs' amended operating specifications.

The purpose of the provision is simple. It's ancillary to the other provisions of the decree and is intended to prevent inaction by the Port Authority where action is either necessary or appropriate to the proper conduct of Concorde flight operations as provided by Secretary Coleman.

Frankly, we do not understand why the Port Authority objects to the provision. We believe it perfectly appropriate and within the scope of the Court's ruling.

THE COURT: Did you ask for that type of relief in the complaint?

MR. GODOFSKY: We did not specify specifically, your Honor. We did ask for all --

THE COURT: Did you specify directly or indirectly?

MR. GODOFSKY: Yes. In our complaint we asked for such other and further relief as to the parties as the Court may deem just and proper under the circumstances.

THE COURT: What facts or circumstances make it just and proper for me to enter a mandatory injunction of that character on the assumption that the Court's order will be disobeyed?

MR. GODOFSKY: I am not suggesting that the Court's order will be disobeyed.

THE COURT: Then why should I anticipate, by a paragraph in the proposed judgment that you submitted, any such thing?

MR. GODOFSKY: Frankly, your Honor, we are all aware of the controversy and the emotionalism generated by this suit.

THE COURT: I didn't know that the Port Authority expressed any emotion.

MR. GODOFSKY: I wasn't talking about the Port

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Authority as such. I was talking about the surrounding atmosphere.

THE COURT: Are we trying this case to the amphitheater or are we trying this case in court between the parties?

MR. GODOFSKY: We are trying this case in court between the parties, but we think it will be very helpful in the orderly conduct of the experiment which your Honor has ordered to have everyone understand that the experiment is to proceed in an orderly fashion so we do not have to come back here later on and argue whether the Authority should or should not take the steps which are normally required to allow the experiment to proceed.

THE COURT: I am perfectly willing at the inception to assume that the actions of the Port Authority will in all respects be orderly and appropriate.

MR. NICKLES: Your Honor, could I make one point.

The problem, or potential problem, that at least prompted our interest in this particular paragraph is the position as expressed by the Port Authority at the oral argument on the summary judgment motion with respect to route-proving flights.

You will see in our last paragraph we

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specifically mentioned the route-proving flights.

You will recall oral argument on the summary judgment motion, the representatives of the Port Authority took the position which we believe is contrary to the Chicago convention, the specific terms of Secretary Coleman's decision, but indeed they took the position that route-proving flights were not authorized.

It is anticipated by the airlines that route-proving flights are both appropriate in the circumstances prior to the commencement of the regularly scheduled commercial flights, so there would be no doubt, it would appear to us to be appropriate, without any reflection on the emotionalism or otherwise, that the fine representatives of the Port Authority thought it would be appropriate to have that last paragraph in the judgment.

THE COURT: Is this proposed judgment that you submitted correct insofar as reciting the names of the new commissioners who have been substituted, or have you used the old form?

MR. GODOFSKY: We have a current box, your Honor.

THE COURT: Mr. Falvey.

MR. FALVEY: Your Honor, with reference to the proposed decretal paragraph that we have been discussing,

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my objection to it was essentially twofold. With your usual precision, you pinpointed the first, namely, that this third mandatory injunction was not encompassed within the complaint specifically. Your opinion says that the plaintiffs are entitled to the injunction and order, declaration and injunction prayed for, and that is why we have no objection to the first two paragraphs. They contain the declaration and the injunction prayed for in the complaint.

The third paragraph is not within the four corners of the complaint, in addition to which --

THE COURT: Even the first two paragraphs do not track the prayers for relief in the complaint exactly, but you are satisfied that the language is materially the same?

MR. FALVEY: Yes, I am, your Honor.

I would make further reference to the dispute paragraph. I would say that I would have great difficulty in interpreting it and you would have great difficulty in enforcing it because of the language included in there which directs us to take all steps and perform all acts necessary to facilitate the operation of the Concorde.

Very frankly, your Honor, I don't know what that means, and I don't know what it adds to the present

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tentative injunction that would be incorporated in the second paragraph.

With reference to route-proving flights referred to by Mr. Nickles, we took the position on oral argument and on brief that we were not preempted either from route-proving flight approval or scheduled flights. You have ruled to the contrary, and if the route-proving flights are permitted under the Coleman decision, we would be enjoined under the second paragraph, to which we have no objection, from in any way interfering with the route-proving flights.

Again, because it wasn't prayed for and because it was ambiguous and unenforceable, I reiterate our objection toward the third decretal paragraph.

THE COURT: I see no occasion for the inclusion of the third paragraph submitted in the proposed judgment of the plaintiffs, and that will be stricken.

I just want to be sure that I have with me your proposed form of judgment in which you ask for additional relief, Mr. Falvey. What color did you submit that on the back? Did you submit one with a back on it?

MR. FALVEY: I believe we did.

THE COURT: Is it any of these? There are so many different pieces of paper submitted here.

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Did you file your papers in the clerk's office, or did you send it to me?

MR. FALVEY: Sent it to you. That is the form.

THE COURT: Is that the form in which you submitted it?

MR. FALVEY: Yes.

THE COURT: I just wanted to be sure I had the right one.

I take it you have a further application, Mr. Falvey?

MR. FALVEY: Yes, I do, your Honor, and that is, with reference to the last paragraph of the form of order that we have submitted, in which we asked that this Court stay the effect of the injunction, which would be included in the order, until defendants have an opportunity to appeal to the Second Circuit and move that court for a stay of the injunction pending disposition of the appeal.

With reference to that, I am frankly a little surprised that the plaintiffs have objected to that. Their affidavit in opposition states they do not contemplate starting commercial flights, that is, Air France, until June 20, and what we are asking basically is that they agree with us not to put the pressure on this

Court and on the Second Circuit which would arise if the injunction were issued without a stay. If it were issued without a stay, my understanding is that the position of the plaintiffs is that they could commence Concorde flights at any time, tomorrow, Sunday, Monday, at any time, until that injunction is stayed.

We would be asking the Circuit Court of Appeals to grant a stay during the pendency of the appeal, assuming, of course, that the stay were granted, the appeal would be expedited and we, of course, would cooperate in every way to expedite the appeal.

We have additional grounds in support of the application for a stay, your Honor, which was set forth in our memorandum, and I hope you have had an opportunity to review that, and I would be pleased to respond to any questions you might have with regard to it.

THE COURT: What, in brief, to your knowledge, is a reason for a stay in a matter of this kind that has been dragging for almost a year, if not over a year?

MR. FALVEY: I think that fact supports our application.

THE COURT: In other words, you think you should receive a premium for having delayed the matter for a year?

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MR. FALVEY: I think it ill behooves the plaintiffs to urge that a stay will irreparably harm them when they filed the suit in March of '76 and didn't bring on their argument for summary judgment until April 28, 1977. Now they are claiming that a stay between now --

THE COURT: I thought the Port Authority had requested three successive adjournments to consider its position at successive meetings, and I recall next to the last meeting being told that the Port Authority would definitely make up its mind as to what it was going to do before the next adjourned meeting with the Court and would inform the Court; and the next thing I heard about that was the Port Authority adjourned without dealing with the matter; so how can you say the plaintiffs have been delaying?

MR. FALVEY: In between the meeting in your courtroom, your Honor, and the date for oral argument, the plaintiffs submitted revised operating procedures to us which we did not have time to review and analyze so that our board could act on a fully informed basis; but at no time did I object to bringing on the argument for summary judgment.

THE COURT: That was consistent with the idea that neither you nor your adversaries wanted a

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determination of the matter, either by the Port Authority or the Secretary, but was going to pass it to the Court.

MR. FALVEY: I don't believe that was my perception of the matter, your Honor.

THE COURT: That is what the minutes say. The minutes say the buck was being passed all around and it finally landed in the Court's lap.

MR. FALVEY: I think the question of a stay is unnecessarily being pressed on you by my opponents because, as I said earlier, they are not planning to start flights until June 20. Why in the world would they want authority to start tomorrow morning or Sunday morning or Monday morning; I don't understand that.

THE COURT: Mr. Godofsky, what do you say to that?

MR. GODOFSKY: Mr. Nickles would like to respond to that, but before he does, let me say that June 20 is the scheduled date for the start of commercial operations. Before then, we are going to have to have some of these route-proving flights that your Honor has heard about, and those are scheduled to start no later than the end of this month.

I would assume the Port Authority would not want us to commence those operations without preliminary

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route-proving flights first, and we are not talking about June 20, which is a month away; we are talking about no later than May 31.

Mr. Nickles wants to make a few comments. Then I would like to address myself to the Court.

MR. NICKLES: Your Honor, the thrust of Mr. Falvey's comment was that we were putting pressure on the Court. He suggested, I think, by his remarks, that perhaps the Court of Appeals was going to decide this matter next week and therefore there would be no delay.

As his order indicated, your Honor, he asked for a stay pending the disposition of the appeal.

Now, Concorde flights into Dulles, your Honor, commenced one year ago, May 20, 1976, and in addition to the usual test which this Court has applied with respect to the granting of the stay, I would note four particular facts that seem to me appropriate, your Honor.

First, with respect to the massive litigation that followed upon the heels of Secretary Coleman's decision in the federal courts of the District of Columbia, request for stays of those flights into Dulles Airport were denied at every level of the district courts, the district court level for the federal and the Court of Appeals and by Chief Justice Burger.

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Secondly, under the operations specifications, Secretary Coleman has provided explicitly that the permission to operate Concorde may be revoked immediately in the event of an emergency deemed harmful to the health, welfare, or safety of the American people; and, moreover, under Article 7 of the Concorde Operating Specifications, the FAA is empowered, in fact has primary jurisdiction, to impose additional noise-abatement procedures to protect the public interest.

We won't rediscuss the merits because I don't think the Port Authority has raised any new insights into the issues, and I don't believe the Port Authority can show a substantial likelihood of prevailing on the merits of their appeal.

More than that, when one gets to the question of irreparable injury, we have submitted an affidavit; and this Court noted and Secretary Coleman noted that the additional impact of all the flights would be marginal at best. This Court noted from the decision of Secretary Coleman that one might increase the total noise around an airport more than it will be increased by the proposed Concorde flight simply by adding a few extra flights by, say, B 707's or DC 8's.

Further, your Honor, Secretary Coleman

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indicated that this was in the national interest to get the experiment started. The government is awaiting the results of the experiment to develop SST regulations, and the government is being sued in Washington for its delay in adopting SST regulations. Thirty days after the end of the experiment, the government will adopt those SST regulations. Secretary Coleman found that the commencement of the experiment was in the national interest of the United States in furtherance of the foreign relations of the United States. Secretary Coleman and the federal government looked to this experiment to determine the economic advi ability, commercial acceptability, and the environment for the Concorde.

It seems to me under the standard test, indeed, in the unique circumstances here, the Port Authority could make out no case for a stay.

MR. GODOFSKY: Your Honor, I would only add to that the fact that the Port Authority has not even submitted an affidavit asserting in conclusionary fashion that it will suffer irreparable injury without a stay.

On the other hand, Air France has submitted an affidavit which shows on its face that it will not only suffer very, very substantial monetary losses if the delay of one year continues on into the future, but also

that --

THE COURT: What prejudice would you suffer if this delay continued until next Tuesday?

MR. GODOFSKY: You mean three days?

THE COURT: Yes.

MR. GODOFSKY: We are not planning to fly this the next three days, but we don't see any basis on which the Port Authority needs relief for the next three days. If they want to apply to the Court of Appeals for a stay, they have plenty of time to do it before Tuesday. Nothing is coming in over the weekend. No proving flights, no commercial flights. There is no basis in the record on which a stay should be granted.

THE COURT: It seems to me that for the sake of good order and regular procedure, and in view of the fact that a regular session of the Court of Appeals to hear motions is scheduled for May 24, 1977, that if there is any concern such as expressed by Mr. Falvey that you are planning to fly planes in here this afternoon, tomorrow, or Sunday or Monday, that no serious prejudice can occur from the ruling which I am about to make.

The history of defendants' delay herein in reaching a decision on its position, although in its March 11, 1976, resolution it announced, in effect, that

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it was seeking only a six-month period to look into the matter, doesn't commend itself to further indulgence by this Court.

However, to give the defendants a reasonable opportunity to apply for relief in the Court of Appeals, a stay is hereby granted of the order and judgment which I will enter this afternoon until 4 p.m. on Tuesday, May 24, 1977, and conditioned that the defendants shall promptly file notice of appeal from the order and judgment of this Court and proceed with expedition thereunder.

The provision that I have just recited will be included with the agreed provisions as expressed by the two parties, and the order will be amended and signed and filed this afternoon.

I believe that concludes the matters to be presented to the Court.

MR. DENSON: May it please the Court.

Sir, we have not been furnished any copy of the proposed order of judgment which your Honor proposes to sign this afternoon, and the best I have at this time is the notes that I have made based upon the discussion here.

THE COURT: I have extra copies up here that were given to me by lawyers that I don t need, and you are welcome to them if you will wait a moment while I sort

them out when I get back into the robing room and send them out.

MR. DENSON: What we intend to do is to renew our motion to intervene based upon your Honor's order of July 6, 1976.

THE COURT: Motion denied.

MR. DENSON: May we file the papers?

THE COURT: You certainly may, and I will endorse them accordingly.

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UNITED STATES DISTRICT COURT

SECOND CIRCUIT

COURT OF APPEALS

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BRITISH AIRWAYS BOARD and
COMPAGNIE NATIONALE AIR FRANCE,

Plaintiffs-Appellees,

- against - 76 Civil 1276

THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY, WILLIAM J. RONAN; W. PAUL STILLMAN; JAMES G. HELIMUTH; VICTOR R. YANITELLI; ANDREW C. AXTELL; GEORGE F. BERLINGER; MILTON A. GILBERT; ROBERT R. DOUGLASS; JAMES C. KELLOGG, III; GUSTAVE L. LEVY; MATTHEW NIMETZ; ALAN SAGNER, Commissioners of the Port Authority of New York and New Jersey,

Defendants-Appellants.

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New York, New York
May 24, 1977, 2:15 p.m.

Before:

HONORABLE ELLSWORTH A. VAN GRAAFEILAND,
HONORABLE STERRY R. WATERMAN,
HONORABLE WILLIAM O. MEHRTENS

Circuit Judges.

Appearances:

PETER JOHN NICKLES, ESQ.
Attorney for British Airways Board and Compagnie Nationale Air France

PATRICK J. FALVEY, ESQ.
Attorney for The Port Authority of New York and New Jersey

Also Present: WILLIAM D. DENSON, ESQ.

JUDGE VAN GRAAFEILAND: British Airways Board. On British Airways, we have two motions for leave to intervene, one by the State of New York and one by the Town of Hempstead, and so forth.

With respect to the State of New York, we are going to deny the motion to intervene. We will give you permission to file an amicus brief, if time permits.

We will have to work out a schedule here to find out where we are going. We are not going to grant the motion to intervene. If you will wait patiently by, we will see what we do about an amicus brief, if any.

MR. DENSON: May it please the Court, I think my position is slightly different from that of the State. I represent the Town of Hempstead. That is on appeal from an order of Judge Pollack denying our motion to intervene, and we have moved for a stay pending a disposition of that motion, your Honor.

JUDGE VAN GRAAFEILAND: I have the motion papers here.

As I read your motion, it is an application to intervene.

MR. DENSON: No, sir, your Honor. This matter is on appeal from an order of Judge Pollack denying our

motion to intervene, which he never even looked at, on the 20th day of May.

JUDGE WATERMAN: So that you claim you are an appellant here just as the other parties are appellants?

MR. DENSON: That is correct, your Honor.

JUDGE WATERMAN: Why did you file a motion to intervene?

MR. DENSON: I didn't file it.

JUDGE WATERMAN: Somebody did, or I cannot read English.

MR. DENSON: No, sir. Let me explain it, if it please the Court.

Down below we filed a motion to intervene before Judge Pollack because we had previously made a motion to intervene in May of 1976, which was denied, and we were granted leave to renew that motion.

Then we appealed that order up to this Honorable Court, and it was affirmed without opinion. At that time the Court said, "Monitor the activities of the Port Authority, and if you find just cause, come back again."

Well, on the 20th day of May, on the settling of the order, if it please the Court, we renewed that motion before Judge Pollack on the grounds then existing,

and we asserted for just cause the fact that the Port Authority was no longer able to represent our rights predicated upon the concessions that they made during the course of their argument and the fact that they said that they could not assert the defenses --

JUDGE WATERMAN: Of course, your time is not yet out, in which you can file the appeal and the proper sum of money to get an appeal. So I assume that will happen eventually.

MR. DENSON: Yes, sir, we filed a notice of appeal already, your Honor.

What we are here on is a motion for stay pending the disposition of our appeal.

JUDGE VAN GRAAFEILAND: I notice we have your motion papers in the District Court. I don't know how they got before us, but that's the motion to intervene that I am looking at.

When was your notice of appeal filed from the order?

MR. DENSON: The notice of appeal was filed yesterday, your Honor.

JUDGE VAN GRAAFEILAND: You are simply appealing from the District Court's denial of your motion to intervene?

MR. DENSON: Yes, sir, and we made that motion to intervene, may it please the Court, predicated upon, as your Honor knows, we have to file a pleading that we propose to file if we were permitted to intervene, and that, sir, was a motion to vacate under Rule 59 the judgment of Judge Pollack.

JUDGE VAN GRAAFEILAND: What I am questioning now is by what right do you move for a stay if you are not a party?

MR. DENSON: Sir, I have an appeal pending to determine --

JUDGE VAN GRAAFEILAND: I understand you do, but you are not a party to this proceeding now. You made a motion to intervene and your motion is denied. Now you are applying for a stay.

MR. DENSON: That is correct, pending a disposition of my appeal from Judge Pollack's order denying my motion to intervene.

JUDGE VAN GRAAFEILAND: We will hear the other side, the other parties, and we will get back to you.

Who is scheduled to speak first?

MR. FALVEY: Patrick J. Falvey, General Counsel, Part Authority of New York-New Jersey, in support of the stay.

If it please the Court, I trust I will be agreeably brief.

The appellants here seek a stay pending an appeal for the reasons set forth in our brief, and the essential reason is that the District Court, badly in our opinion, misinterpreted Secretary Coleman's decision. Because of that threshold error, the District Court order before you represents the very first decision by a federal District Court that deprives the airport operator of power to regulate aircraft noise and control its impact on the people residing near the airport.

JUDGE WATERMAN: I don't think so. I was around at the time the case of Town of Hempstead against American Airlines was decided in which the Port Authority became a party --

MR. FALVEY: I believe, your Honor, that case related to an ordinance adopted by the Town of Hempstead as an exercise of its police power.

JUDGE WATERMAN: That's right. You indicated that the Port Authority never had been licked before in this area, and it was then.

MR. FALVEY: Your Honor, I wasn't making that point at all. As a matter of fact, we were a moving party to have the Town of Hempstead ordinance declared

unconstitutional, which was the result in t at case, because that ordinance purported to regulate flight.

What we are talking about here is the power of an airport operator to decide whether or not to accept aircraft which cannot possibly meet or which may not possibly meet its noise standards.

That's why I say this is the first District Court decision depriving an airport operator, careful distinction, of the power to enact and enforce such regulations.

JUDGE VAN GRAAFEILAND: Counsel, let me interrupt you for a minute.

Is there anything that you would want to put in on your final record on appeal that isn't in your papers already?

MR. FALVEY: As long as the transcript of the oral argument is before the Court, as I believe it is, and one exhibit that I submitted on the argument representing a statement by the present Secretary of Transportion, Brock Adams, I would be content, your Honor, to rest on the record before the Court.

JUDGE VAN GRAAFEILAND: What I have in mind, counselor, is this. Instead of going through this twice, whether it is not possible to set this thing down for a hearing on the merits within a very short time.

MR. FALVEY: Your Honor, I would be delighted to do so. In fact, I would propose that we do that on the basis of the briefs below, without taking additional briefs here.

JUDGE VAN GRAAFEILAND: What I would like to do is set this down for a hearing on the merits next week.

MR. FALVEY: I would be delighted, your Honor.

JUDGE VAN GRAAFEILAND: Why don't you do this. Why don't all of you counsel go out in the hall, unless you are all prepared to say so now, and decide whether you can argue this appeal on the merits Wednesday, June 1st.

MR. FALVEY: I can say now that I would be, your Honor.

JUDGE VAN GRAAFEILAND: If you can do that, we may save a lot of time of all parties of all counsel today and then you will have a hearing on the merits and we will know where you are going.

Why don't we hear the next matter, then call this case again and all counsel can come back.

MR. DENSON: May it please the Court, I am not so sure where I fit into this picture now after your Honor has --

JUDGE VAN GRAAFEILAND: You might just as well join the conference.

MR. DENSON: I will be happy to join up with them and find out what they want to do, but I just really, sir, am concerned, because the fact is, as Judge Waterman points out, I am actually an appellant here and I merely tried to do this for the benefit of saving time, because this matter was being submitted for a stay and I also wanted a stay just as well.

Am I to understand, sir, that, I can complete my record and be able to argue on June 1st --

JUDGE VAN GRAAFEILAND: I am reasonably sure that the Court will want to hear everything.

(RECESS)

MR. NICKLES: We have agreed with the suggestion of the Court to present argument to this panel next Wednesday at the convenience of this panel.

JUDGE VAN GRAAFEILAND: It will not be this panel, you understand. We are just sitting this week. It will be another panel.

MR. NICKLES: The schedule that we have adopted is that the principal brief, if there is to be any, of the Port Authority is to be submitted on Friday with the response of the airline-appellees to be submitted by noon on Tuesday of next week.

JUDGE VAN GRAAFEILAND: What time on Tuesday?

MR. NICKLES: About noon on Tuesday.

MR. FALVEY: And any response by the appellants to be submitted by 9:00 o'clock on Wednesday.

MR. NICKLES: One thing we want to be sure about, your Honor, is that any documents that come in on Wednesday morning at 9:00 are responsive documents and not in effect the principal documents, otherwise we are put in the awkward position of being the appellees but submitting the first brief.

MR. FALVEY: I have characterized it as a response, your Honor.

JUDGE VAN GRAAFEILAND: Is that agreeable to everybody?

MR. FALVEY: Yes, your Honor.

JUDGE VAN GRAAFEILAND: You have your appeal pending, Mr. Denson. I see no reason why your appeal cannot be heard on the same day.

MR. DENSON: Thank you, your Honor.

JUDGE VAN GRAAFEILAND: I assume it will be heard before this one because that will determine what your extent of participation is going to be.

MR. DENSON: That's very nice, your Honor.

JUDGE VAN GRAAFEILAND: In any event, it will

be heard on the same day. They have a busy calendar on Wednesday, so we will set this thing for 2:00 o'clock Wednesday afternoon, which will give you ample time to argue and we will have a panel, I don't know who it will be yet, but we will have a panel for you, next Wednesday at 2:00 o'clock.

MR. FALVEY: Your Honor, my assumption is that in the meantime the stay is being continued.

JUDGE VAN GRAAFEILAND: We will continue it until next Wednesday, with the understanding that if this case is not argued next Wednesday, the stay will be lifted.

What happens after next Wednesday will depend on the panel that is sitting then.

MR. FALVEY: I understand.

JUDGE VAN GRAAFEILAND: We will continue the stay until next Wednesday, and if it is not argued then, the stay is lifted.

MR. DENSON: May it please the Court, I respectfully suggest that I follow the same schedule as has been set by the British Airways and the Port Authority.

JUDGE VAN GRAAFEILAND: It is agreeable with us.

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MR. DENSON: Just one other thing, your Honor.

I would like to take full responsibility for the confusion that arose here with respect to my status before this Court. I think it is due to the fact that I misstated the court in which the papers were filed. I had United States District Court. It was not the fault of the clerk but my little old fault, and I am sorry, and I apologize for it.

(Court adjourned.)

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CERTIFICATE OF SERVICE

WE hereby certify that ~~I~~ WE have served two copies each of the Joint Appendix and Brief of the Town of Hempstead, et al., on this the 27th day of May 1977, by handing the same to the receptionist at the office of each of the following counsel:

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